No. 89-7743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THADDEUS DONALD EDMONDSON,

Petitioner,

v.

LEESVILLE CONCRETE COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND AMERICAN JEWISH COMMITTEE

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QUESTIONS PRESENTED

1. Does 28 U.S.C. § 1870 require or authorize a federal judge to exclude a black prospective juror in a civil case where a party seeks to exclude that juror by means of a peremptory challenge because of his or her race?

2. Do 28 U.S.C. § 1862 or 42 U.S.C. § 1981 forbid a federal judge from excluding a black prospective juror in a civil case where a party seeks to exclude that juror by means of a peremptory challenge because of his or her race?

3. Where a civil jury has been assembled by means of race-based peremptory challenges, does a federal court have inherent authority to dismiss that jury?

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INTEREST OF AMICI[1]

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist blacks to secure their constitutional and civil rights by means of litigation. The Fund's attorneys represent the plaintiffs in a number of federal civil rights cases which have been or will be tried before civil juries. E.g. *City of Little Rock v. Reynolds*, No. 90-1.

The Lawyers' Committee for Civil Rights Under Law is a nationwide civil rights organization founded in 1963 by members of the American Bar, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights.

The American Jewish Committee is a national membership organization, founded in 1906 for the purpose of protecting the civil and religious rights of Jews. AJC has always believed that these rights can be secure for Jews only

[1]The parties have consented to the filing of this amicus brief.

if they are equally secure for Americans of all faiths, races and ethnic backgrounds. AJC, therefore, has been actively involved in the civil rights cause since its inception. The organization has always urged that civil rights laws be interpreted broadly to effectuate their purposes. AJC believes that the exclusion of African Americans from juries in civil cases through the use of peremptory challenges is a grievous deprivation based on race which is in violation of existing law.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth in Appendix A.

SUMMARY OF ARGUMENT

The courts below should not have passed on the constitutionality of excluding a jury or because of a race-based peremptory challenge without first deciding whether federal law authorizes or requires the removal of such jurors. Section 1870, 28 U.S.C., which establishes peremptory challenges in civil cases, should be interpreted in a manner that avoids this constitutional problem.

The essence of the peremptory challenge authorized by section 1870 is a challenge which does not require proof that the juror in question should be removed for cause. But that is a far cry from authorizing litigants to introduce racial considerations into the jury selection process. The purpose of peremptory challenges is to enable a party to exclude a prospective juror who it believes may be biased. But "[a]

person's race simply is 'unrelated to his fitness as a juror'". *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). For that reason *Swain v. Alabama*, 380 U.S. 202, 224 (1965), recognized that the removal of a juror solely because of his or her race would be a "perverted" use of a peremptory challenge. Section 1870 should not be construed to authorize or require removal of a juror where the proposed peremptory challenge would frustrate rather than advance the creation of an impartial jury.

The general language of section 1870 must be construed in the light of the more specific provisions of federal laws prohibiting racial discrimination in jury selection. Section 1862, 28 U.S.C., expressly provides that "[n]o citizen shall be excluded from service as a ... juror on account of race." The word "excluded" is a term of art under the Jury Selection and Service Act of 1968; jurors removed from a panel because of a peremptory challenge are said to be "excluded". Section 1981 of 42 U.S.C. prohibits racial

discrimination in jury selection. *Strauder v. West Virginia*, 100 U.S. 303, 311-12 (1880). Section 1981 applies to private as well as government action. *Patterson v. McLean Credit Union*, 105 L.Ed.2d 132 (1989).

This Court has substantial supervisory power over the federal courts, and has utilized that authority to prohibit discriminatory jury selection practices. *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) (wage earners); *Ballard v. United States*, 329 U.S. 187 (1946) (women). The exercise of that authority is even more appropriate where the discrimination at issue is racial. The Court's supervisory power should be exercised in the circumstances of this case to protect the right of black prospective jurors to participate in the administration of justice. "The reality is that a juror dismissed because of his race will leave the courtroom with a lasting sense of exclusion from the experience of jury participation...." *Holland v. Illinois*, 107 L.Ed.2d 905, 922

(Kennedy, J., concurring). Federal judges should not be knowing accomplices to such discriminatory practices.

ARGUMENT

I. THIS COURT NEED NOT DECIDE THE CONSTITUTIONAL QUESTION ADDRESSED BY THE COURTS BELOW

The decisions of the courts below are largely devoted to a constitutional question -- whether *Batson v. Kentucky*, 476 U.S. 79 (1986), should be applied to civil cases. Had the instant case arisen in state courts, it could be resolved in this Court only by addressing that constitutional issue. In *Batson*, for example, the Kentucky courts had already held that the disputed exercise of peremptory challenges in that case was consistent with state law. See 476 U.S. at 84. The instant case, however, was filed and tried in federal court. Accordingly, this Court would have no need or occasion to reach any constitutional question until and unless it determines that *federal* law required or authorized the

district judge to take the actions whose constitutionality was challenged below.

It has been the consistent practice of this Court to decline to address a constitutional question where a case can be resolved on a non-constitutional basis. *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972). It is, moreover, the settled policy of this Court "to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 104 L.Ed.2d 923, 932 (1989). In the instant case any legal authority for the exclusion of the black prospective jurors at issue can only derive from the federal statute establishing peremptory challenges in civil cases, 28 U.S.C. § 1870. If the disputed actions were authorized or required by section 1870 and those actions are indeed unconstitutional, then section 1870 would to that degree itself be unconstitutional.

Despite these two well established prudential rules, the en banc decision below considered only the constitutional issue, assuming without explanation or comment that federal law requires federal judges to implement, indeed protect the use of, race-based peremptory challenges in civil cases. The original panel decision in petitioner's favor, on the other hand, relied at least in part on a construction of section 1870.[2] A number of other lower court decisions regarding the use of race-based peremptory challenges in civil cases have specifically dealt with non-constitutional arguments regarding such challenges.[3] This Court noted in *Batson* the existence of conflicting lower federal court decisions regarding whether the issue determined in that case on a

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[2]*Edmondson v. Leesville Concrete Co.*, 860 F.2d 1308, 1312 (5th Cir. 1989).

[3]*Maloney v. Washington*, 690 F. Supp. 687, 690 (N.D.Ill. 1988) (28 U.S.C. § 1862); *Esposito v. Buonome*, 642 F. Supp. 760, 761 (D.Conn. 1986) (28 U.S.C. §§ 1861, 1862); *Clark v. City of Bridgeport*, 645 F. Supp. 890, 896 (28 U.S.C.§ 1862), 897 ("inherent supervisory power") (D.Conn. 1986); *Holley v. J. & S. Sweeping Co.*, 192 Cal. Rptr. 74, 77, 143 Cal. App. 3d 588 (1983) (relying on state statutes similar to 28 U.S.C. §§ 1861, 1862).

constitutional basis could, in a federal case, be resolved by reference to the inherent supervisory powers of the federal courts. 476 U.S. at 82 n. 1.

The non-constitutional issues raised by this case are fairly comprised in the questions presented by the petition.[4]

II. FEDERAL LAW NEITHER REQUIRES NOR PERMITS A FEDERAL JUDGE IN A CIVIL CASE TO EXCLUDE A BLACK PROSPECTIVE JUROR BECAUSE OF A RACE-BASED PEREMPTORY CHALLENGE

Petitioner first objected to the use of race-based peremptory challenges immediately after respondent had announced which jurors it wished the trial judge to exclude, but before the trial court had acted to remove from the jury box the two black venirepersons, Willie Combs and Wilton Simmons, to whom respondent objected.[5] The issue raised by this first objection is whether a trial judge is obligated or permitted by federal law to remove a black prospective juror

[4]Petition, pp. i (section 1870, "[]power to supervise"), 7 ("discretion" of trial judge), 8 (28 U.S.C. § 1861), 9 (28 U.S.C. § 1870).

[5]Tr. 52-54.

if a civil litigant seeks to exercise a race-based peremptory challenge.

In the present posture of this case we do not know whether respondent objected to Combs and Simmons solely because they were black, since the trial court declined to question counsel for respondent. In other cases, however, in response to such inquiries, defense attorneys have been quite brazen in proclaiming their desire to obtain an all-white jury:

> [I]f I had a choice between a white juror and a black juror, I'm going to take a white juror ... [W]hy should I put ... my defendants at the mercy of the people in my opinion who make the most civil rights claims.[6]

> Counsel for the defendant conceded that race was a *factor*.... Although he claimed there were other reasons, he did not articulate them.[7]

On the view of the en banc court, the obligations of the trial

[6]*Clark v. City of Bridgeport*, 645 F. Supp. 890, 894 (D.Conn. 1986).

[7]*Williams v. Coppola*, 41 Conn. Supp. 48, 549 A.2d 1092, 1094 (Super. 1986) (emphasis in original).

judge in this case would have been the same even if counsel for respondent had openly proclaimed that he was objecting to Combs and Simmons expressly and solely because they were black. The court of appeals insisted that a federal judge, faced with an avowedly race-based peremptory objection to a black juror, would be legally required to remove the black juror at issue, and would be powerless to correct the racially tainted process that followed. On this view a Ku Klux Klan leader sued for an alleged act of racial violence could as a practical matter insist, brazenly and with success, on trial by an all-white jury, and a present or retired member of this Court, trying a case by designation, would be obligated to assist in an avowedly racist jury selection process.

A. Such A Race-Based Exclusion Would Be Inconsistent With The Purpose of Section 1870

The authority of federal judges in civil cases to exclude jurors because of peremptory challenges derives from 28

U.S.C. § 1870. We contend that section 1870 should be construed in a manner consistent with the constitutional rule in *Batson*. Any prospective juror, regardless of race, may be excluded by peremptory challenge, and, so long as no invidious motive is involved, a party is not prohibited from using peremptory challenges to exclude jurors of the same race as the opposing party. Where, however, a party seeks to exercise a peremptory challenge against a venire person because of his or her race, section 1870 neither requires nor authorizes a federal judge to remove that prospective juror. Where a judge declines on this basis to remove a juror, the objecting party retains the right to exercise that challenge, but must do so on a non-racial basis.

The en banc panel did not explain why it believed federal law compels the removal of a black juror because of a race-based peremptory challenge, other than to assert that that is "what the rule requires", 895 F.2d at 222, and that the use of peremptory challenges in civil cases is a

"common law" practice of "great age." 895 F.2d at 223, 226. In fact, however, the origin and age of peremptory challenges in civil cases are entirely different than those of the challenges accorded criminal defendants.[8] The only form of peremptory challenge recognized under the common law was that provided to defendants in criminal cases; as a practical matter, even it was largely limited to defendants in capital cases. *Swain v. Alabama*, 380 U.S. 202, 211-13 & n. 9 (1965). Under the common law, no party in a civil case was accorded any peremptory challenges.[9]

Peremptory challenges in civil cases were virtually unknown in this country when the Constitution was adopted, and became widespread only toward the end of the

[8]The exercise of peremptory challenges by defendants in federal criminal cases may raise somewhat distinct issues which we do not undertake to address.

[9]J. Proffatt, *A Treatise on Trial by Jury*, §§ 155, 163 (1877); *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 331 Mass. 366, 119 N.E.2d 169, 172 (1954); *Sackett v. Ruder* 152 Mass. 397, 25 N.E. 736, 738 (1890); *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N.W. 53, 55 (1896).

nineteenth century.[10] Consistent with the common law and state practice, the Judiciary Act of 1790 authorized peremptory challenges in federal courts only in capital cases.[11] The use of peremptory challenges in federal civil cases derives from legislation first enacted by Congress in 1872.[12] The current provision regarding such challenges, 28 U.S.C. § 1870, provides in pertinent part: "In civil cases, each party shall be entitled to three peremptory challenges." Any obligation imposed on federal judges to remove a black juror because of a race-based peremptory challenge must derive, if at all, from section 1870.

By according to civil litigants "peremptory challenges," Congress undoubtedly meant to create a species of challenge

[10]Proffatt, *supra*, § 163.

[11]1 Stat. 119; see *Holland v. Illinois*, 107 L.Ed.2d 905, 917 n. 1 (1990).

[12]17 Stat. 282. In 1840 Congress authorized the federal courts to adopt local rules regarding jury selection based on state practice. 5 Stat. 394. This legislation was interpreted to authorize the adoption of local rules regarding peremptory challenges. *United States v. Shackleford*, 18 How. (59 U.S.) 588 (1856). None of the federal court rules which we have been able to find from this era contain any references to peremptory challenges.

different than a challenge for cause. The essence of a peremptory challenge is that the objecting party can obtain the removal of a juror "without showing any cause at all." *Lewis v. United States*, 146 U.S. 370, 376 (1892). But to provide that a party may obtain the removal of a prospective juror without demonstrating good cause is a far cry from providing that the party has an absolute right to remove the juror, even if its reason be one harmful to the administration of justice. The law often accords individuals the freedom to take action arbitrarily, or for no reason at all, and yet forbids the same action if taken for an invidious motive. Under Title VII, for example, a private employer is free to reject a job applicant out of whim or caprice, but is forbidden to do so on the basis of race or sex.

The central purpose of peremptory challenges is to permit a party to remove potential jurors who it believes, but cannot demonstrate, may in fact be biased. A party

> may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases the peremptory challenge is a protection against his being accepted.

Hayes v. Missouri, 120 U.S. 68, 70 (1887). The legislative history of section 1870 reveals that, in authorizing peremptory challenges in civil cases, Congress sought to provide litigants with a safeguard against biased jurors:

> In civil cases in cities, where frequently we get a merchant on the jury, he may be as much interested as the man whose case is being tried, and it is necessary to get him off the jury. We therefore amend the law by entitling each party in such cases to three peremptory challenges.[13]

Resort to a peremptory challenge may also be necessary where a juror may have taken offense because a party had sought, without success, to remove that juror for cause. *Swain v. Alabama*, 380 U.S. 202, 219-20 (1965).

In both *Swain* and *Batson*, however, this Court emphasized that removal of a prospective juror because of his or her race would be a "perverted" use of a peremptory

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[13]Cong. Globe, 42d Cong., 2d Sess., 3411 (1872) (Rep. Butler).

challenge. *Batson v. Kentucky*, 476 U. S. at 91; *Swain v. Alabama*, 380 U.S. at 224.[14] Such a perverse application of section 1870 would be entirely inconsistent with the intent of Congress to facilitate removal of possibly partial jurors:

> Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial.... A person's race simply is "unrelated to his fitness as a juror."

Batson, 476 U.S. at 87.[15]

The larger purpose of peremptory challenges, and of section 1870, is to assure that civil cases will be decided by juries "which in fact and in the opinion of the parties are

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[14]See also *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E. 2d 499, 515 n. 28 ("what is involved here is an apparent perversion of a system designed to preclude prejudice"), *cert. denied* 444 U.S. 881 (1979).

[15]In enacting the Civil Rights Act of 1875, which forbad racial discrimination in the selection of federal or state juries, Congress emphatically rejected objections that blacks as a race could not be trusted to fairly adjudicate the rights of whites. Cong. Globe, 42nd Cong. 2d sess., app. 218 (Rep. McHenry), app. 598-99 (Rep. Rice) (1972). These debates occurred within a month of passage of the peremptory challenge provision now codified in section 1870. It is inconceivable that Congress intended to authorize civil litigants to remove black jurors on the very racist premise that Congress spurned in passing the Civil Rights Act.

fair and impartial." *Swain v. Alabama*, 380 U.S. at 212; see also *id.* at 218, 222; *Batson v. Kentucky*, 476 U.S. at 91.

> Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of "eliminat[ing] extremes of partiality on both sides," ... thereby "assuring the selection of a qualified and unbiased jury."

Holland v. Illinois 107 L.Ed.2d 905, 919 (1990). When section 1870 was first enacted, Representative Butler explained, "What we aim at here is to get a fair jury."[16]

The exclusion of black prospective jurors by means of race-based peremptories, however, would impair the very impartiality which Congress intended peremptory challenges to enhance. Regardless of whether the person making the selections is a government agent or a private party, the exclusion of jurors on the basis of race

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[16]Cong. Globe 42d Cong., 2d sess., 3412 (1872).

> cast[s] doubt on the integrity of the whole judicial process. [It] create[s] the appearance of bias in the decision of individual cases, and [it] increase[s] the risk of actual bias as well.

Taylor v. Louisiana, 419 U.S. 522, 532 n. 12 (1975).

> As long as there are significant departures from the cross sectional goal, biased juries are the result -- biased in the sense that they reflect a slanted view of the community they are supposed to represent.

Id. at 529 n. 7.

> [T]he exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases.... It is in the nature of the practices ... that proof of actual harm, or lack of harm, is virtually impossible to adduce.

Peters v. Kiff, 407 U.S. 493, 503-04 (1972) (Opinion of Justice Marshall). The state courts of Massachusetts, Connecticut, California, Florida and New York have all concluded from practical experience that the exercise of race-based peremptory challenges increases substantially the risk that the resulting jury will be biased against members

of the excluded race. We set forth excerpts from those state court opinions in Appendix B.

It is particularly unlikely that in 1872, only four years after the ratification of the Fourteenth Amendment, Congress could have intended by enacting section 1870 to require federal judges to accede to the desire of civil litigants to purge blacks systematically from federal juries. By adopting the Civil Rights Acts of 1866 and 1871, Congress had conferred upon the federal courts primary responsibility for redressing violations of the rights of the newly freed slaves. Congress could have been under no illusion about how an all-white federal jury in any of the former confederate states would likely dispose of the civil rights claims of a black plaintiff.

> [I]t required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would ... be looked upon with jealousy and positive dislike.... "The right of trial by jury" ... is ... guarded by statutory enactments intended to make impossible ... "packing juries." It is well known that prejudices often exist against particular classes in the

> community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.... The framers of the [Fourteenth] Amendment must have known full well the existence of such prejudice.

Strauder v. West Virginia, 100 U.S. 303, 306-09 (1880). It is difficult to believe that the Reconstruction era Congress, having largely rewritten the federal Constitution and enacted revolutionary legislation in order to afford badly needed protection to the freedmen, could have intended section 1870 to license a scheme of race-based peremptory challenges that would have subverted all the legislative efforts of previous years. That danger is far from past; with the exception of the instant case, it appears that *all* of the reported federal civil cases in which parties have sought to purge black jurors involved claims under either the Civil Rights Act of 1866 or the Civil Rights Act of 1871.[17]

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[17]*Clark v. City of Bridgeport*. 645 F.Supp. 890 (D.Conn. 1986) (1871 Civil Rights Act); *King v. County of Nassau*, 581 F.Supp. 493 (E.D.N.Y. 1984) (Civil Rights Acts of 1866, 1871, and 1964); *Maloney v. Washington*, 690 F.Supp. 687 (N.D.Ill. 1988), 584 F. Supp. 1263, 1264-66 (N.D.Ill. 1984) (Civil Rights Act of 1866 and 1871); *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990) (Civil Rights Act of 1871); *Fludd v. Dykes*, 863 F.2d 822, 824 (5th Cir. 1989) (Civil Rights Act of 1871); *Esposito v. Buonome*, 642 F.Supp. 760 (D.Conn. 1986), 647 F. Supp. 580, 580 (D.Conn. 1986) (Civil Rights Act of 1871; see also *Parker v. Downing*, 547 So.2d 1180 (Civ. App. Ala. 1988) (Civil Rights Act of 1871).

That Congress did not intend section 1870 to sanction race-based peremptory challenges in civil cases is confirmed by the fact that the act of 1872 governed as well the exercise of peremptory challenges in criminal cases.[18] Although *Swain* and *Batson* reached differing conclusions regarding the appropriate method of proof, no member of this Court has doubted that the exercise of a race-based peremptory challenge by a government prosecutor would, if proven, constitute the type of invidious government action forbidden by the Constitution. In 1872, when many framers of the Fourteenth Amendment were still members of the House and Senate, there would assuredly have been an outcry of protest had Congress understood the proposed legislation to

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[18]See Appendix C.

authorize federal prosecutors to exercise, and federal judges to implement, race-based peremptory challenges in criminal cases. If the "peremptory challenges" authorized by the 1872 Act in criminal cases do not encompass race-based objections, it is difficult to see how the same phrase in the same statute could have a different meaning as applied to civil cases.

Undeniably the language and legislative history of section 1870 do not address directly the question of whether race-based peremptory challenges may be used to exclude minorities from a jury. But it is, at the least, a "reasonable alternative interpretation" of section 1870 that that provision does not authorize such discrimination; section 1870 should be construed in that manner to avoid the constitutional difficulties addressed by the courts below. As we set forth in part III, the federal courts possess inherent authority to forbid jury selection practices that discriminate on the basis or race. The general language of section 1870 certainly

cannot be said to evince any clear congressional intent to restrict that judicial power.

B. Such A Race-Based Exclusion Would Be Inconsistent With Federal Statutes Prohibiting Discrimination In Jury Selection

Even if the general provisions of section 1870, read in isolation, might appear to authorize removal of a juror because of a race-based peremptory challenge, the illegality of excluding a juror on that basis is clear under the more specific congressional legislation regarding racial discrimination in jury selection. Section 1870 should be interpreted in a manner consistent with these anti-discrimination laws. Two federal statutes prohibit discriminatory jury selection in broad language fully applicable to the exercise of race-based peremptory challenges by either government or private attorneys. Two other statutes confirm that that was precisely the intent of Congress.

1. 28 U.S.C. § 1862

Section 1862, adopted in its present form as part of the Jury Selection and Service Act of 1968, provides:

> No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States ... on account of race, color, religion, sex, national origin, or economic status.

Petitioner objected in the district court that venire-persons Combs and Simmons had indeed been excluded on account of their race from service as petit jurors in this case. The literal language of section 1862 is all-encompassing; it recognizes no exception for instances in which the discriminatory exclusion was achieved by means of a peremptory challenge, or where the invidious motive was that of a private attorney or litigant. Section 1862, which derives from the Civil Rights Act of 1875,[19] should like

[19]18 Stat. 335.

"other Reconstruction civil rights statutes ... be[] ... 'accord[ed] ... a sweep as broad as [its] language.'" *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971).

The manifest purpose of section 1862 was to provide "for the selection, without discrimination, of Federal grand and petit juries."[20] Congress believed that juries from which racial minorities had been systematically excluded would be more likely to return biased verdicts.[21] Other provisions of the 1968 legislation established detailed procedures designed to assure that minorities were not excluded from jury venires, either intentionally or because of practices with discriminatory effects. 28 U.S.C. §§ 1863-1866. Congress could not have intended to permit litigants to defeat this carefully crafted legislative scheme through the use of race-based peremptory challenges. "There is no point in taking elaborate steps to ensure that Negroes are included on

[20]H.R. Rep. No. 1076, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News, 1792, 1792.

[21]H.R. Rep. No. 1076, 90thCong., 2d Sess., 8 (1968).

venires simply so they can then be struck because of their race by a ... use of peremptory challenges." *McCray v. New York*; 461 U.S. 961, 968 (1983). (Marshall J., dissenting from denial of certiorari).

The deliberate use of the term "excluded" in section 1862 leaves no doubt that the prohibition against discrimination applies to the use of peremptory challenges. In the Jury Selection and Service Act the word "excluded" is a term of art. Jurors deleted from a venire or removed from a jury panel are, depending on the reason, referred to in the Act as having been "disqualified,"[22] "excused",[23] "exempt"[24] or "excluded".[25] The phrasing of the statute was based on "a careful articulation of the grounds upon which

[22]28 U.S.C. § 1865 ("qualifications" of English literacy, etc.).

[23]28 U.S.C. §§ 1863(b)(5) (jurors "excused" because of "extreme inconvenience"), 1866(c)(1).

[24]28 U.S.C. § 1863(b)(6) ("exemptions" for public officials).

[25]28 U.S.C. §§ 1866(c)(2) (jurors "excluded" because of partiality), 1866(c)(4).

persons may be eliminated from jury service as: 'disqualified,' 'exempt,' 'excused' or 'excluded.'"[26] Under section 1866(c) a juror can be removed from a jury panel at the behest of a party only for cause or if "*excluded* upon peremptory challenge as provided by law." (Emphasis added).

The congressional purpose underlying the Civil Rights Act of 1875, which first prohibited racial discrimination in jury selection, would clearly be frustrated if black prospective jurors could be purged by means of race-based peremptory challenges. The principle concern of Congress was that all-white juries would be hostile to black litigants. Representative Morton argued:

> I ask if with the prejudices against the colored race entertained by the white race ... the colored man enjoys the equal protection of the laws, if the jury that is to try him for a crime or determine his property must be made up exclusively of the white race?.... I ask ... whether the colored men ... have the equal protection of the laws when the

[26]H. R. Rep. No. 1076, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. and Admin. News, 1792, 1802.

> control of their right to life, liberty, and property is placed exclusively in the hands of another race of men, hostile to them, in many respects prejudiced against them, men who have been educated and taught to believe that colored men have no civil and political rights that white men are bound to respect.[27]

It was said that blacks could not "obtain justice in State courts because colored fellow citizens are excluded from the juries."[28] An end to discrimination in the selection of jurors was sought so that a black litigant might have among the jurors deciding his claims "those who would naturally have an interest in him."[29]

(2) 28 U.S.C. § 1861

Section 1861, also adopted as part of the Jury Selection and Service Act of 1968, provides in pertinent part:

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[27]Cong. Globe, 43rd Cong. 2d sess., 1793-95 (1875); see also *id.* at 427 (Rep. Stowell), 945 (Rep. Lynch), 1863 (Sen. Morton).

[28]Cong. Globe, 42nd Cong., 2d sess., 823 (Sen. Sumner) (1872).

[29]Cong. Globe, 43rd Cong. 1st sess., 3455 (Sen. Frelinghuysen) (1874).

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.

Section 1861 is an authoritative guide to the correct interpretation of the jury selection provisions of Title 28, applicable to section 1862 as well as section 1870.

If, as petitioner alleges, prospective jurors Combs and Simmons were removed because they were black, the resulting jury was not "selected at random from a fair cross section of the community." Rather, the jury which tried this case was selected on the basis of race from what was, until the exercise of the peremptory challenges, a fair cross section of the community. Such a selection process flies in the face of the congressional policy announced in section 1861.

(3) 42 U.S.C. § 1981

Section 1981 provides in part that

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory ... to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

In *Georgia v. Rachel*, 384 U.S. 780 (1966), and *Strauder v. West Virginia*, 100 U.S. 303 (1880), this Court held that the provision assuring the "full and equal benefit of all laws and proceedings" guaranteed to a black litigant "the right to have his jurors selected without discrimination on the ground of race." 384 U.S. at 798, *citing Strauder*, 100 U.S. at 311-12. Section 1981 is violated when prospective jurors of the same race as a black litigant are excluded on account of race, since the proceedings which follow are different than those which would be afforded to whites, a difference sought solely because of the race of the black litigant and

the excluded jurors.[30] The discriminatory jury selection prohibited by section 1981 can as readily be achieved by peremptory challenges as by manipulation of the venire list; both forms of discrimination are equally prohibited.

Rachel and *Strauder* involved criminal prosecutions. But the application of section 1981 is not limited to discrimination by government officials. This Court held in *Runyon v. McCrary*, 427 U.S. 160, 170 (1976), that "§ 1981 ... reaches purely private acts of racial discrimination." The Court unanimously reaffirmed that interpretation of section 1981 in *Patterson v. McLean Credit Union*, 105 L.Ed.2d 132, 150 (1989) ("[W]e ... adhere to our decision in Runyon that § 1981 applies to private conduct"). If a private party had resorted to threats or

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[30]The equal benefit clause encompasses as well a guarantee that blacks will be accorded to the same degree as whites the protection afforded by state criminal proceedings. A statute, like certain of the slave codes, attaching a lesser degree of criminality to a crime against a black victim would violate section 1981. Thus section 1981 would apply to some race-based peremptories by criminal defendants, i.e. a peremptory challenge, in the trial of an inter-racial crime, intended to remove prospective jurors of the same race as the victim.

violence to prevent blacks from serving on the jury in this case, section 1981 would undeniably have afforded petitioner, and the prospective jurors, redress. See *Griffin v. Breckenridge*, 403 U.S. 88, 97-104 (1971). A fortiori section 1981 applies when a federal judge is asked "to compel ... discriminatory action [in the] federal courts." *Hurd v. Hodge*, 334 U.S. 24, 35-36 (1948).

Section 1981 would clearly apply to peremptory-based discriminatory jury selection in a contract action brought by a black plaintiff. The contract clause of section 1981 "covers wholly *private* efforts to impede access to the courts" by a black litigant seeking to enforce contractual rights. *Patterson*, 105 L.Ed.2d at 151 (emphasis in original). Surely the equal benefit clause of section 1981 provides the same protection when a plaintiff's claim sounds in tort rather than in contract. Were that not the case, section 1981 would preclude race-based peremptories in state court contract actions, but would allow the use of race-

based peremptories in a civil rights claim brought in federal court under sections 1981 and 1983. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-64 (1987); *Wilson v. Garcia*, 471 U.S. 261 (1985).

4. 18 U.S.C. § 243

The only federal jury discrimination statute that contains the kind of state action requirement adopted by the court of appeals in this case is the criminal prohibition against discriminatory jury selection. The wording of the criminal provision is significant because it is deliberately narrower than sections 1861, 1862 and 1981. Section 243 of Title 18 provides:

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such

cause, shall be fined not more than $5,000.

Section 243 is applicable only to "an officer or other person charged with any duty in the selection or summoning of jurors." Clearly counsel for respondent could not have been prosecuted under section 243, even if his racial motives were clear beyond any reasonable doubt.

Equally clearly, however, section 243 demonstrates that Congress knew full well how to place a state action requirement in federal law, and did so expressly when it desired such a limitation. Having enacted four different statutes prohibiting racial discrimination in the jury selection process, Congress deliberately chose to place a state action requirement only in section 243. The only plausible interpretation of this careful distinction is that Congress did not desire to limit sections 1861, 1862 and 1981 to conduct by "an officer", but intended those provisions to extend to all race-based action excluding blacks from juries, regardless of the status of the individuals involved.

III. THE FEDERAL COURTS HAVE INHERENT AUTHORITY TO DISMISS A CIVIL JURY ASSEMBLED BY MEANS OF RACE-BASED PEREMPTORY CHALLENGES

After the district judge in this case had removed prospective jurors Combs and Simmons, and empaneled the jury that ultimately heard the case, petitioner's objection was renewed.[31] At this juncture the issue was not whether section 1870 authorized the removal of Combs and Simmons, but whether the resulting jury should be permitted to try the case, or should be stricken because of the manner in which it was assembled. The district judge and the en banc court concluded that the jury in a case such as this could not be dismissed unless the exclusion of Combs and Simmons was itself unlawful. On the view of the en banc majority, if the removal of those black prospective jurors was not unconstitutional state action, "then the courts hold no warrant to interfere" with the resulting jury. (895 F.2d at 221).

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[31]Tr. 54-63.

The courts below adhered to an unduly constricted view of their authority, and responsibility, in dealing with jury panels assembled by means of race-based peremptory challenges. The federal courts possess broad inherent authority to take measures necessary to protect the integrity of judicial proceedings. This Court holds commensurately extensive supervisory powers over the manner in which proceedings are conducted in the federal courts. In the decades since *McNabb v. United States*, 318 U.S. 332 (1943), the Court has exercised that authority in a wide variety of circumstances. *McNabb* explained that the supervisory power could be invoked to "maintain[] civilized standards of procedure" and has been "guided by considerations of justice." 318 U.S. at 340-41. Surveying the diverse situations in which this power has been exercised, one commentator observed that the "common

denominator of its usage is a desire to maintain and develop standards of fair play...."[32]

This Court may interfere with the judgment or proceedings of a state court only when a violation of federal law or applicable constitutional requirements has occurred. But in dealing with federal proceedings, the federal courts have broader inherent authority, and "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505 (1983). "[T]he appellate court[s] ... may ... require [trial courts] to follow procedures deemed desirable from the viewpoint of sound judicial practice although in no-wise commanded by statute or by the Constitution." *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). In a number of instances the exercise of this supervisory power has led this Court to overturn judgments in federal

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[32]Note, 53 Geo. L.J. 1050, 1050 (1965).

cases despite sustaining similar state court judgments in essentially identical circumstances."

Few practices have greater potential impact on the integrity of the judicial process than the manner in which jurors are selected. The selection process is a sensitive one, all too easily skewed to unduly favor one party or group, and to undermine public confidence in the fairness of the federal courts. In *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946), this Court invoked its supervisory power to overturn a civil jury verdict because wage earners had been systematically excluded from the jury at issue. That exclusion, the Court concluded, although not the subject of any express statutory prohibition, was inconsistent with "the high standards of jury selection" that ought to prevail in federal courts, 328 U.S. at 225, and tainted the resulting verdict with "class distinctions and discriminations which are

"*Compare Marshall v. United States*, 360 U.S. 310 (1959) *with Murphy v. Florida*, 421 U.S. 794 (1975); *compare Aldridge v. United States*, 283 U.S. 308 (1931), *with Ristaino v. Ross*, 424 U.S. 589 (1976).

abhorrent to the democratic ideals of trial by jury." 328 U.S. at 220. In *Ballard v. United States*, 329 U.S. 187 (1946), the Court again invoked its supervisory authority to forbid federal district courts from systematically excluding women from the jury rolls. The Court explained that the use of all-male juries "may at times be highly prejudicial to the defendants," and that such exclusionary practices worked an "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." 329 U.S. at 195.

This Court held that the juries in *Thiel* and *Ballard* should not have been permitted to try those cases, even though the manner in which the juries had been selected could not be said to have violated a specific, identified statutory or constitutional provision. The fact that a skewed or tainted jury may have been the result of peremptory challenges, rather than of the manner in which the venire was composed, does not reduce the Court's supervisory

authority. If, as a result of happenstance, the jury selected to hear a police brutality case was composed of twelve former police officers or of twelve ex-convicts, no sensible judge would hesitate to strike that jury and assemble a new one. The judicial responsibility is surely no less when the skewed nature of a jury is the result, not of coincidence, but of deliberate racial manipulation of the jury selection process.

The exclusionary practices in *Ballard* and *Thiel* concerned women and wage earners, respectively. The deliberate exclusion of blacks from civil and criminal juries is an abuse of unique gravity in our constitutional system. Discrimination against black prospective jurors was first condemned by this Court 110 years ago in *Strauder v. West Virginia*, 100 U.S. 303 (1880); over the course of the last century, even when other forms of discrimination were tolerated for a period under the ill-starred decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), this Court was ceaseless

in its efforts to eradicate race-based jury discrimination. If the federal courts have inherent supervisory authority to deal with jury discrimination involving women and wage earners, *a fortiori* they possess and should exercise that authority when the discrimination at issue is directed at racial minorities.

The deliberate exclusion of black jurors has a unique and long recognized capacity to destroy public confidence in the fairness of the courts.

> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.... [It] destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion ... of Negroes ... impairs the confidence of the public in the administration of justice.... The harm ... is to society as a whole.

Rose v. Mitchell, 443 U.S. 545, 555-56 (1979). Such practices inevitably suggest "that justice in a court of law may turn upon the pigmentation of skin." *Ristaino v. Ross*, 424 U.S. 589, 596 n. 8 (1976). The decision in *Batson* was based on an express recognition that the exclusion of black

prospective jurors by means of race-based peremptories would "undermine public confidence in the fairness of our system of justice." 476 U.S. at 87. The court in *Williams v. Coppola*, 41 Conn. Supp. 48, 549 A.2d 1092, 1101 (Super. 1986), put the matter more bluntly:

> The use of peremptory challenges to remove all the possible jurors of one of the party's race seriously impairs the perception of justice. Members of a minority, under those circumstances, could never feel that they received a fair trial.

This Court has reiterated that maintaining public confidence in the fairness of the courts was a key purpose of the decision in *Batson*. *Holland v. Illinois*, 107 L.Ed.2d 905, 922 (Kennedy, J., concurring); *Allen v. Hardy*, 478 U.S. 255, 259 (1986).

The decisions below offer subtle analyses of the concept of state action. But such legal niceties are entirely irrelevant to the indelible impression that the exercise of race-based peremptory challenges can have on public confidence. Regardless of whether the action of a judge in implementing

such challenges is or is not technically unconstitutional, the parties, the public and the prospective jurors will inevitably regard the judge as "an accomplice to racial discrimination in the courtroom." *Maloney v. Washington*, 690 F. Supp. 687, 690 (N.D.Ill. 1988). When a racially hand-picked all-white jury in a racially sensitive case returns a verdict in favor of the white litigant, community concerns about unfairness will not be stilled by an admonition to read *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). The decision of the Florida courts to bar race-based peremptory challenges in civil cases was the result, in part, of the state's tragic experience with the consequence of a collapse of public confidence in racially skewed juries.[34] In "the Kingdom of Heaven" even hand-picked all-white juries might be relied on to do justice between black and white litigants, *cf. Carter v. Jury Commission of Greene County*, 396 U.S. 320, 342 (1970) (Douglas, J., concurring); but here on earth

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[34]We set forth in Appendix D excerpts from the trial judge's opinion in *City of Miami v. Cornett*, 463 So.2d 399 (Fla. App. 3 Dist. 1985).

the public understandably shares the view of those who exercise race-based peremptories that the exclusion of black prospective jurors is likely to tilt the scales of justice in favor of a white litigant.

A court which condones the use of race-based peremptories does not, as the en banc court suggested, simply provide a "level playing field" on which the parties may do battle. (895 F.2d at 222). The decision below also gives the parties license to do battle with racial weapons of unique destructiveness; under that decision overtly race-based jury selection would inevitably become a part, perhaps the most critical part, of the trial of racially sensitive cases, if not of all cases in which the parties are of different races. The racially explicit brawling to which this would lead is starkly illustrated by *Maloney v. Washington*, 690 F. Supp. 687 (N.D.Ill. 1988). The white plaintiffs in *Maloney*, alleging that they were the victims of reverse discrimination, brought suit against the black mayor of Chicago. Although

the gravamen of the complaint was an insistence that all government action should be strictly color blind, the plaintiffs "apparently concluded that they would prefer to have their case tried by members of their own race." *Id.* at 688. The plaintiffs utilized all of their peremptory challenges against blacks; the defendants responded by using all of their challenges against whites. When a mistrial was declared on unrelated grounds, the trial judge warned counsel not continue making race-based peremptory challenges; counsel for both sides disregarded that admonition, forcing the court to strike the second jury and impose sanctions. 690 F.2d at 689-92.

Strauder and its progeny contemplated that the courts would be a safe harbor from the often virulent bigotry of an earlier era; today, when overt racism is regarded as unacceptable in most aspects of American life, the decision below threatens to turn the federal courts into an arena when express exploitation of race will be entirely acceptable, and

even commonplace. Federal judges should not stand idly by while civil cases are manipulated through manifestly racial tactics. "For racial discrimination to result in ... exclusion from jury service ... is at war with our basic concepts of a democratic society." *Smith v. Texas*, 311 U.S. 128, 130 (1940). "[I]n such a war the courts cannot be pacifists." *People v. Wheeler*, 583 P.2d 748, 755, 148 Cal. Rptr. 890 (1978).

The Fifth Circuit insisted that by tolerating race-based peremptories the courts merely took a position of neutrality with regard to the litigants "in their dealings with each other." (895 F.2d at 225). But race-based peremptories, even if resorted to equally by both sides, have a direct impact on innocent third parties -- the jurors excluded on account of race.

> [T]he exclusion of Negroes from jury service ... denies the class of potential jurors the "privilege of participating equally ... in the administration of justice," ... and it stigmatizes the whole class, even those who do not wish to participate, by declaring them unfit for jury service and thereby putting "a

> brand upon them ... an assertion of their inferiority."

Peters v. Kiff, 407 U.S. 493, 499 (1972) (opinion of Justice Marshall). *Swain* expressly recognized the injury caused to prospective jurors when

> the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. Th[is] en[d] the peremptory challenge is not designed to facilitate or justify.

380 U.S. at 224.[33] "The reality is that a juror dismissed because of his race will leave the courtroom with a lasting sense of exclusion from the experience of jury participation...." *Holland v. Illinois*, 107 L.Ed.2d 905, 922 (1990) (Kennedy, J., concurring). The right to participate as a juror in the administration of justice, like the right to participate as a voter in the democratic process, cannot be denied on account of race, even if the impetus for that denial

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[33]Compare Cong. Rec., 42nd Cong., 2d sess., 900 (1872) (Sen. Edmunds) (prohibition against discrimination in jury selection required so that the black "population shall feel and the white population shall feel that they participate equally and fairly in the administration of justice and in the protection of private rights.")

comes to some degree from individuals who are not on the public payroll. See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

The jury selection practices at issue in this case are in all respects more harmful to the due administration of justice than the practices condemned in *Thiel* and *Ballard*. The Court should exercise its supervisory power to direct the federal courts not to try cases before juries selected by means of race-based peremptory challenges.

CONCLUSION

Were the Court to reach the constitutional question considered below, we would urge the Court to hold that in a civil case the removal of a prospective juror because of a race-based peremptory challenge is unconstitutional. The instant case, however, may more appropriately be resolved on non-constitutional grounds. For the above reasons the en

banc decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Statutory Provisions Involved

Section 243, 18 U.S.C., provides:

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

Section 1861, 28 U.S.C., provides:

> Declaration of Policy. It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United

States, and shall have an obligation to serve as jurors when summoned for that purpose.

Section 1862, 28 U.S.C., provides:

> Discrimination Prohibited. No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States and the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

Section 1870, 28 U.S.C., provides in pertinent part:

> Challenges. In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

Section 1981, 42 U.S.C., provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and

proceedings for the security of persons and property as is enjoyed by white citizens....

APPENDIX B

State Decisions Regarding The Impact of Race-Based Peremptories

(1) *Commonwealth v. Soares*, 387 N.E.2d 499 (Sup. Jud. Ct. Mass. 1979). The lack of any prohibition against race-based peremptory to challenges

> "would leave the right to a jury drawn from a representative cross-section of the community wholly susceptible to nullification through the intentional use of peremptory challenges to exclu[de] identifiable segments of the community.... It is [the] very diversity of opinion among individuals, some of whose concepts may well have been influenced by their group affiliations, which is envisioned when we refer to 'diffused impartiality.' No human being is wholly free of the interests and preferences which are the product of his cultural, family, and community experience. Nowhere is the dynamic commingling of the ideas and biases of such individuals more essential than inside the jury room....
>
> Given an unencumbered right to exercise peremptory challenges ... [t]he party identified with the majority can altogether eliminate the minority from the jury.... The result is a jury in which the subtle biases of the majority are permitted to operate, while those of the minority have been silenced."

387 N.E.2d at 515-18. When a party

> "challenges a Negro in order to get a white juror in his place, he does not eliminate prejudice in exchange for neutrality; ... [H]e is, in fact, willy nilly taking advantage of racial divisions to the detriment of the [opposing party]."

387 N.E.2d at 516 n. 31.

> "The absence of a group from petit juries in communities ... may lead to jury decision making based on prejudice rather than reason. White jurors, satisfied that blacks will never sit in judgment upon themselves or their white neighbors, can safely exercise their prejudices."

387 N.E.2d at 512 n. 20.

(2) *People v. Wheeler*, 583 P.2d 748, 761, 148 Cal. Rptr. 890 (1978):

> "[w]hen a party ... peremptorily strikes all [members of a racial minority] for that reason alone, he ... frustrates the primary purpose of the representative cross-section requirement. That purpose ... is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences. Manifestly if jurors are struck simply because they hold those very beliefs, such interaction becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the majority."

(3) *Williams v. Coppola*, 549 A. 1092, 1097-98, 41 Conn. Sup. 48 (Super. 1986):

> "If a party were to have the unfettered right to exercise peremptory challenges for any reason, the right to trial by an impartial jury would lose its meaning. So, if blacks could be struck from the jury merely because they were black, there would be no purpose in taking elaborate steps to guarantee their inclusion in the venire. ... Tools that deprive a party of a trial by an impartial jury or even the perception of such a trial have no place in a constitutional democracy."

(4) *People v. Thompson*, 435 N.Y.S. 2d 739, 751-52, 79 A.D.2d 87 (1981):

> "[W]e agree ... that viewing the jury as a whole, permitting the unencumbered exercise of peremptory challenges does anything but ensure the selection of an impartial jury.... [T]he unfettered use of the peremptory challenge on the basis of race may, in and of itself, ultimately defeat the ... right to trial by a jury drawn from a fair cross-section of the community."

(5) *State v. Neil*, 457 So.2d 481, 486 (Fla. 1984):

> "Article I, section 16 of the Florida Constitution guarantees the right to an impartial jury.... The primary purpose of peremptory challenge is to aid and assist in the selection of an impartial jury. It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group

> from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury.... [W]e find that adhering to the *Swain* test of evaluating peremptory challenges impedes, rather than furthers, Article I, section 16's guarantee."

APPENDIX C

17 Stat. 282 (1872)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two of the act entitled "An act regulating proceedings in criminal cases, and for other purposes," be, and the same is hereby, amended to read as follows:

"Sec. 2. That when the offence charged be treason or a capital offence, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges,

whether to the array or panel, or to individual jurors, for cause or favor, shall be tried by the court without the aid of triers."

APPENDIX D

Trial Court Opinion in *Cornett v. City of Miami*.

Reported in *City of Miami v. Cornett*, 463 So.2d 399, 400-01 (Fla. App. 3 Dist. 1985).

> "This trial commenced shortly after verdicts had been returned in two other much publicized cases. In the latter of the two cases, the county's school superintendent, a black, was indicted, suspended from office, then convicted of grand theft. The Superintendent was tried before an all-white jury after a number of blacks had been challenged peremptorily. In the earlier case, an all-white jury acquitted several white officers of murder and manslaughter charges in the beating of a black insurance agent -- the infamous 'McDuffie Case'. All prospective black jurors had been challenged, some for cause, most peremptorily. Moments following the verdict in that case there was a civil disturbance in the community resulting in millions of dollars of property damage and several deaths. Those killed included whites and blacks, and in a few instances the motives were clearly racial. Judicial notice is taken of these background circumstances as they shed light on community tensions in general at the time of this trial and the probable effect on the conduct of this trial. Some white prospective jurors admitted that they couldn't be fair. At least one admitted to being fearful and asked to be excused.
>
> * * *
>
> "The misuse of the peremptory challenge to eliminate identifiable groups contributes to an

> undermining of the integrity of the justice system. Unquestionably there are cases where the outcome of the trial has been determined by the composition of the jury -- with results contrary to the weight of the evidence. The existence of such an unimpaired ability to manipulate the outcome of a trial is a legitimate reason for doubt as to fairness. It then becomes the responsibility of the court to minimize that potential for abuse by imposing some reasonable limitations on the exercise of the challenge. This is essential if the community is to have confidence in the jury trial process. The facts, the issues raised, and the timing of the trial are circumstances which in combination made this case an extremely sensitive one.